# PARATE EXECUTIE CLAUSES: IS THE DEBATE DEAD?

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## INTRODUCTION

Since its inception, the Constitution of the Republic of South Africa, Act 108 1996 has time and again compelled the refinement, revision and, in some cases, the abandonment of established legal principles. In this note we consider the impact of the recent Supreme Court of Appeal decision in *Bock & others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) on the debate concerning the constitutionality of parate executie clauses in pledges of movables. Simply put, these clauses (almost invariably included in pledge agreements) provide for the sale by the creditor, on default by the debtor, of property pledged to the creditor without recourse to the courts. The primary issue is whether these clauses unjustifiably infringe s 34 of the Constitution, which grants everyone the right to have 'any dispute that can be resolved by the application of law' decided in a court or independent tribunal.

This debate arose as a result of the Constitutional Court decisions in *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) and *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa* 2000 (3) SA 626 (CC). In *Lesapo* and *Sheard* the Constitutional Court dealt with statutory provisions in the agricultural field (provisions of the Land Bank Act 13 of 1944 and the North West Agricultural Bank Act 14 of 1981) entitling banks to seize and sell the property of defaulting farmers without an order of court. The court struck

down these provisions as unconstitutional. In *Lesapo* (supra) para 22 it held that in allowing the court process to be bypassed, these provisions entitled banks to engage in impermissible acts of self-help, and commented that 'the right of access to court is the bulwark against vigilantism and the chaos and anarchy which it causes'. In so deciding, the court made the important point that while the constitutional right, on the face of it, is concerned with disputes between parties, creditors must nevertheless approach a court before seizing and selling property *even where there is no dispute* concerning the validity of the obligation between the parties or concerning the debtor's default (*Lesapo* (supra) para 15).

The issue of the constitutionality of parate executie clauses in pledges of movables has not yet come before the Constitutional Court. Other courts have, however, dealt with the issue and the decision in *Bock* (supra) is, at the time of writing, the latest to deal explicitly with the matter. Subsequent to the decision in *Bock*, the Supreme Court of Appeal handed down the decision in *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA). We do briefly consider this case, given the references in it to the *Bock* decision; we do not, however, discuss it in detail as, unlike *Bock*, it does not concern a pledge of movables.

While this note does discuss the Supreme Court of Appeal's reasoning in *Bock*, it does not purport to comment on the correctness of the court's conclusions, nor does it seek to provide a detailed analysis of the constitutionality of parate executie clauses. Rather, our aim is to examine the impact of the decision on the debate about these clauses and to demonstrate that the conclusion that the case has resolved this debate may be premature.

## THE FACTS IN *BOCK*

The *Bock* case essentially involved an appeal by sureties (the appellants) for release from their obligations under a number of deeds of suretyship. The appellants stood surety for the obligations of L S Molope Holdings (Pty) Ltd (the debtor) to three banks. The respondent was the cessionary of the banks' claims (the creditor). The issues pertaining to each of the sureties and each of the banks were similar and were heard (and discussed by the court) together. Shares were pledged to secure the principal debt. On default by the debtor, the banks took over the pledged shares and reduced the value of the debtor's indebtedness by the value of these shares. The appellants argued, inter alia, that the manner in which this was done prejudiced them, and this led to their release from the suretyships.

The court analysed the pledge contained in the documents of one of the banks (which was similar to that of the other banks). This permitted the bank, on default by the debtor 'immediately or at any time thereafter irrevocably and *in rem suam* or at its discretion . . . to realise the securities . . . or to take over the securities at the bank's election at a fair value' (quoted in *Bock* (supra) para 5). The court noted that in terms of this clause, the bank could elect either to realize the pledged shares by disposing of them to a third party or to take

them over at a fair value. The court drew a distinction (para 6) between three distinct legal concepts:

> '*(a)* The right to dispose of a pledged article without the intervention of a court order, commonly known as *parate executie*; *(b)* the contractual right of taking over a pledged article by the creditor — a *pactum commissorium*; and *(c)* the quasi conditional sale whereby the creditor may, upon default, take over a pledge at a fair price.'

In this case the bank took over the shares itself, and the outcome in this matter related to the validity of this action and its effect on the validity of the suretyships (with the court concluding that the sureties were not released from their obligations). The outcome of the case did not rest on the legality of parate executie clauses. In fact, the court explicitly points out that the banks did not purport to exercise a right of summary execution (para 16).

These clauses are, however, discussed at some length — the reason for this being that the court a quo and 'the appellants in argument' had assumed that the right exercised by the banks was a right of parate executie (para 11). The appellants had argued that such clauses are unconstitutional in that they conflict with s 34 of the Constitution. A similar argument, albeit on different facts, had succeeded in the earlier case of *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E), to which we now turn in order to explore in greater detail the background to the decision in *Bock*.

## THE *FINDEVCO* DECISION

*Findevco* concerned a perfection clause in a general notarial bond. Perfection clauses, such as the one in question in this case, authorize a creditor to take possession of a debtor's movable property to perfect its security and to dispose of such property. The debtor remains in possession of the property but agrees that the creditor is entitled to take possession on default. On grounds that have subsequently been severely criticized (notably by Professor Susan Scott in 'Summary execution clauses in pledge and perfecting clauses in notarial bonds' 2002 (65) *THRHR* 656), Froneman J found the perfection clause in question to be unconstitutional.

The broad statements of Froneman J in *Findevco* also cast doubt upon the constitutionality of parate executie clauses in the context of pledges of movables. This caused quite a stir amongst creditors and lawyers whose tried and tested security mechanisms were called into question. Understandably, the case gave rise to considerable uncertainty.

Uncertainty in this area was particularly disturbing given that parate executie clauses are used in numerous commercial contexts. While the Constitutional Court cases mentioned above dealt with fairly uncomplicated relationships of the farmer/land bank type, the use of parate executie clauses is widespread and extends to highly sophisticated and complex financial transactions involving significant sums of money. In the derivatives arena, for example, certain provisions in standard derivatives securities documents (including para 8 of the New York Credit Support Annex published by the International Swaps and Derivatives Association) provide for parate executie in respect of pledged property, and the enforceability of such clauses has been

debated (for example, at the *ISDA South Africa Conference: Update on New 2002 ISDA Documentation Projects*, held in Johannesburg on 21 August 2002). The uncertainty has also had an impact on the security arrangements to be considered when developing securitization structures. The cross-border nature of many of these transactions means that uncertainty in this area has the potential to influence the attractiveness of deals or transactions that are connected to South Africa.

Given the potentially serious consequences of the approach in *Findevco* (further noted by Scott op cit), many practitioners anticipated that the view reflected in that case regarding parate executie clauses in pledges of movables would be tempered, if not overruled, by a future decision.

## CONTINUING UNCERTAINTY

The issue of the constitutionality of perfection and parate executie clauses was revisited in three notable judgments: *Tems Fresh Meat Wholesalers v D.Z.'s Meat Centre CC* (unreported) WLD Case 2001/5487 (judgment of Jordaan AJ, handed down on 12 July 2001); *De Beer v Keyser* 2002 (1) SA 827 (SCA); and *Senwes Ltd v Muller* 2002 (4) SA 134 (T). Rather than providing a speedy resolution of the issue, these contradictory and conflicting decisions exacerbated the uncertainty.

The *Tems* case also dealt with a perfection clause in a general notarial bond. After analysing the Constitutional Court decisions, the court concluded that it could not agree with the *Findevco* decision that these clauses were unconstitutional. Jordaan AJ distinguished the Constitutional Court decisions, where the banks' powers were authorized by statute, from the facts before him and saw no reason why contracting parties could not insert such clauses into a contract by mutual agreement. The court furthermore emphasized that the constitutional provision was concerned with disputes between parties. Where there is no dispute, parties should be free to rely on perfection clauses. The judge justified his decision on commercial grounds, holding that to 'emasculate' notarial bonds by following the *Findevco* approach would discourage creditors from granting credit, and this would not be in the interests of the economy or entrepreneurs (*Tems* (supra) at 15). While this may be a laudable approach commercially, it seems to contradict the express holding in the Constitutional Court decisions that recourse to a court is required even in the absence of a dispute. In view of the divergence of opinion on the matter, it is both interesting and disconcerting to note that the *Tems* decision was not reported.

The Supreme Court of Appeal touched on this matter in passing in the case of *De Beer* (supra). While the court did not regard the matter before it as involving parate executie, it did briefly consider the constitutionality of such clauses, noting that such clauses in private security agreements had recently been held to be constitutionally invalid (para 26). Although the Supreme Court of Appeal did not decide the matter, this reference in passing seemed to endorse the *Findevco* approach.

In the final case to be noted, *Senwes* (supra), the bond in question expressly allowed the creditor to attach and sell mortgaged movable property without recourse to the courts. Moseneke AJ had no trouble in finding this clause unconstitutional. He stated, however, that clauses such as the one in question (which he regarded as a parate executie clause) are merely collateral to the main purpose of the agreement, which is to provide security, and that the offending provisions could be severed from the rest of the agreement so that the remainder could still be enforced (at 142I–143A). By severing the offending provisions, the clause was interpreted in such a manner as to require the assistance of the courts.

## AND ALONG CAME *BOCK*

At this point there were contradictory High Court decisions, with the Supreme Court of Appeal appearing to endorse the *Findevco* position that contractual parate executie clauses are unconstitutional, and going so far as to remark on their 'objectionable features' (*De Beer* (supra) para 27). In its decision in *Bock* (with different members of the court sitting) the Supreme Court of Appeal, however, appears to have indicated that it views the *Findevco* decision as wrong in so far as it regarded parate executie clauses in pledges of movables as unconstitutional.

Word of the *Bock* decision spread rapidly, prompting a collective sigh of relief that the matter had been settled in favour of the constitutionality of parate executie clauses in pledge agreements. Such confident feelings of relief may, however, be premature; in our view, the case does not prevent a future litigant mounting a plausible argument against the constitutionality of these clauses.

The first and obvious point is that the issue is a constitutional one and, given that the Constitutional Court is the highest court in all constitutional matters (s 167(3) of the Constitution), the matter can strictly speaking be regarded as settled only once the Constitutional Court has considered it. In so far as the decisions of the Supreme Court of Appeal are taken as an indication of the possible future direction of the debate, however, a discussion of the *Bock* decision is certainly relevant.

Our second general point, alluded to earlier, is that the statements of the Supreme Court of Appeal in *Bock* regarding parate executie clauses are, in fact, obiter. A litigant could well argue this in a subsequent case and may even point to the apparently conflicting obiter statements of the same court in the *De Beer* case. Admittedly, these latter statements are less forceful than those to be found in *Bock* and, in addition, a strong obiter statement of the Supreme Court of Appeal would be persuasive in a lower court. The obiter statements in *Bock* could also be seen as having been bolstered by the subsequent decision in *Juglal* (supra), given the latter case's endorsement of *Bock* and rejection of *Findevco*. *Juglal*, however, provides limited support as it deals with perfection clauses in general notarial bonds and, in so far as it can be seen to address parate executie clauses in pledges of movables, the court's comments in *Juglal* are also obiter.

Any future challenge to the constitutionality of parate executie clauses in pledges of movables would nevertheless have to deal with the forceful statements made in *Bock* (and the court's approval of these in *Juglal*). As we see it, however, the manner in which the court in *Bock* addressed the issues does not dispose of the matter in such a way as to close the door to such a challenge. We now turn to a brief review of certain aspects of the judgment to illustrate this point.

*The court's approach*

Harms JA, writing for the court, begins his discussion of parate executie clauses by noting that the principles pertaining to these clauses are trite: they are, with limited exceptions, invalid in mortgages of immovable property but valid in the case of movables held in pledge (*Bock* (supra) para 9). The proviso in this latter instance, as stated in the leading case of *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 at 547, is that a debtor may 'seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights'.

After briefly discussing the principles pertaining to the distinct legal concepts of pactum commissorium and conditional sale, Harms JA goes on to consider the appellants' argument that parate executie clauses in a pledge of movables are unconstitutional. The appellants based this argument on the Constitutional Court's decisions in *Lesapo* (supra) and *Sheard* (supra) which, as previously noted, concerned the constitutionality of legislative provisions allowing state seizure and sale of movable and immovable property belonging to and held by the debtor.

Harms JA's response to this is that he finds it 'difficult to extend the proscription of these statutory provisions . . . to *parate executie* of movables which are lawfully in the possession of the creditor' (para 13). With reference to a number of passages in *Lesapo* which identified the offending features in the statutory provisions, Harms JA notes (ibid) that a parate executie clause

> 'does not authorise a creditor to bypass the courts and "seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession". It does not entitle the creditor "to take the law into his or her hands". It does not permit "the seizure of property against the will of a debtor in possession of such property".'

A further distinguishing factor for Harms JA is the proviso noted in *Osry* (supra) that the debtor is able to seek the protection of the court if his rights are unduly prejudiced in the course of the creditor's exercising his right of parate executie. This, to Harms JA, indicates that the creditor could not be seen to be a judge in his own cause (ibid).

Harms JA sees the law relating to parate executie clauses as drawing a clear and 'sensible distinction' between instances where the creditor is in possession of the security and those where such security is in the hands of the debtor (para 14). The Constitutional Court decisions concerned provisions that entitled the creditor to take possession of and sell property held by the debtor — this being a deviation from the common-law position referred to above.

Without further consideration, Harms JA states that it follows that the judgment in *Findevco* is wrong in so far as it found that the common-law rules relating to parate executie of movables were unconstitutional. He does not feel it necessary to provide further reasons for this, stating that Prof Scott's criticisms of *Findevco*, in the article referred to above, are 'generally to the point' (para 15).

*Analysis of the court's approach*

We see a number of difficulties with the above approach that render questionable any reliance on these statements as a definitive pronouncement on the constitutionality of the clauses. What the case seems to be saying (in simple terms) is:

(i) the provisions in *Lesapo* and *Sheard* that were found to be unconstitutional were statutory provisions;
(ii) the common-law position on contractual parate executie clauses can be distinguished from the prohibited statutory provisions; and
(iii) therefore, the common-law contractual provisions are not unconstitutional.

Although the court admittedly did provide some independent bases for regarding the common-law contractual provisions as constitutional — other than that they simply differed from the unconstitutional statutory provisions — there still appears to be a substantial gap in the reasoning of the court. This gap might have been overcome had these independent bases been explored further and a full constitutional analysis undertaken. Simply saying that (a) the creditor is not seizing property of which the debtor was in possession; (b) that the debtor can seek the protection of the court if there has been prejudice to the debtor in the manner in which the creditor has acted; (c) that the common law recognizes the unlawfulness of self-help (all at para 13); and (d) that Professor Scott has cogently criticized *Findevco* (para 15) does not amount to a sufficient constitutional analysis. Of course, the absence of a comprehensive analysis may be explained on the basis that this was an obiter discussion and by the fact that the appellants did not properly place the issues before the court. The fact remains, however, that the Supreme Court of Appeal has made a forceful statement on the issue. We feel that there is room for criticism of each of the bases for its decision put forward by the court.

- *First basis: The debtor may seek the protection of the court if there has been prejudice*

Turning first to the argument that the debtor may seek the protection of the court if, in carrying out the provisions of the agreement and effecting a sale, the creditor has acted to the prejudice of the debtor. In these circumstances the onus is on the debtor to institute a challenge. There is no obligation on the creditor to approach the court before acting. The Constitutional Court has, however, said that the ability of the debtor to challenge the actions of the

creditor in court does not remedy the deficiencies in an otherwise unconstitutional process. In *Lesapo* (supra) para 20 the court stated that '[t]he fact that the debtor may have recourse to a court of law after the attachment takes place does not cure the limitation of the right; it merely restricts its duration'. While this passage refers to attachments, the important point that applies equally here is that the ability of the debtor to challenge the actions of the creditor does not necessarily remedy the mischief. It should be noted, however, that our point is not that creditors should, in all circumstances, be obliged to approach a court every time they wish to take action in relation to their debtors — there are certainly occasions where a debtor should be the party who bears the onus of instituting action after the creditor has acted (for example, where a creditor cancels a contract pursuant to an unremedied breach). The point is simply (as the Constitutional Court has emphasized) that the Constitution requires creditors to approach a court prior to taking action in certain circumstances. A more detailed constitutional analysis is demanded in order to identify whether these circumstances are present in a particular case.

- *Second basis: Possession of the property by the creditor*

The court placed most of the emphasis in its discussion on the issue of possession. It repeatedly emphasized the fact that, in a pledge of movables, the creditor is already in possession of the property subject to summary execution. It is suggested that the objectionable 'self-help' would lie in the unlawful seizure of the property. Where the creditor is in possession, this concern is alleviated. The significance of possession is re-iterated in the *Juglal* decision (supra) para 9. There are a number of points to be made here:

(i) In the earlier Supreme Court of Appeal decision in *De Beer* (supra), the court seemed to indicate that what was objectionable about parate executie clauses was not the seizure of the property but its sale by the creditor, stating (para 26) that '[t]he principal objection to the practice is that without judicial control the property might be sold by the creditor on terms that are unduly prejudicial to the debtor.' While the response to this could be that the debtor has access to court if the creditor has acted in a manner prejudicial to the debtor, as indicated earlier, this does not sufficiently answer a charge of unconstitutionality.

(ii) While the Constitutional Court, in *Lesapo* (supra) and *Sheard* (supra), did admittedly speak in terms of the dual actions of seizing and selling, there are dicta in these decisions that would support the argument that a sale by a creditor of property already lawfully in its possession — in other words without the separate seizure of the property — may be unconstitutional. For example, in *Lesapo* Mokgoro J, when discussing s 34 of the Constitution, comments (para 16) that 'any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land'. While this statement is clearly very broad and would capture innumerable transactions

involving the transfer and disposal of property, the point is that the court was not concerned only with the unsupervised seizure of property by a creditor. The argument about the distinguishing and redeeming feature of parate executie clauses in a pledge of movables, being that the creditor is already in possession of the property, thus does not fully address the constitutional concerns.

(iii) The arguments regarding possession also need to be carefully made where, as in *Bock* (supra), the property pledged is incorporeal, such as shares. This is particularly so when one considers that many security arrangements involve the pledge of dematerialized shares. This 'pledge' involves the electronic noting of the security interest of the creditor in the electronic share account of the debtor held with a Central Securities Depository Participant (on this see s 6 of the Custody and Administration of Securities Act 85 of 1992 and s 91A of the Companies Act 61 of 1973). This seems far removed from the traditional notion of possession and control on which the common-law principles are based. Should parate executie clauses in pledges of dematerialized shares be treated differently from parate executie clauses in pledges of certificated shares? Surely possession as a distinguishing factor seems arbitrary in these circumstances and calls for a more subtle analysis?

- *Third basis: The court's reliance on Scott*

While possession also features strongly in the arguments of Scott op cit, she sees a further distinction between cases where the debtor has consented to action being taken in respect of its property and cases where it has not. She argues that '[i]n a summary execution clause in a pledge of movables there is no spoliation (no self-help) since the pledgor has already voluntarily parted with his/her possession and has authorized the pledgee to sell the property at an execution sale' (at 662) and later (at 663) that '[t]he existence of these clauses in pledge agreements is based on expediency and the freedom of contract. If a person is willing to part with his/her property voluntarily to secure a debt, why should that person not be allowed to authorize the creditor to sell the property without recourse to the courts, should the debtor be in default?' The court in *Juglal* (supra) paras 10 and 27 makes a similar point.

This distinction also does not draw the dividing line between constitutionality and unconstitutionality. First, the argument here should at least consider the issues raised by waiving or contracting out of constitutional rights. Secondly, our common law of contract is replete with examples of instances where parties cannot simply include in their contracts whatever provisions they deem fit. See, for example, those cases dealing with the unenforceability of pactum commissorium provisions (a recent example of which is cited in *Bock* (supra) para 8) and those dealing with certificates of indebtedness constituting conclusive proof (for example, *Ex parte Minster of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Donelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A)).

Scott's article does, however, provide a cogent critique of the *Findevco* decision in a number of respects. In particular, as Harms JA noted in *Bock* (supra) para 15, Scott points out the failure of the *Findevco* judgment to distinguish between the distinct legal concepts of perfection clauses, statutory powers to seize the property of debtors and summary execution clauses in pledge agreements. Harms JA's statement, however, that '[i]t is not necessary to deal with all the reasons for this conclusion [that the finding in *Findevco* that the law relating to parate executie clauses in pledges of movables is unconstitutional, is wrong] since the criticism of Prof Susan Scott is generally to the point' (para 15) is problematic in a number of respects.

It does not seem satisfactory to incorporate by reference an academic critique in lieu of providing reasons. It may be argued that it was not necessary for the court to provide reasons on this point as it was an obiter discussion. The statement that *Findevco* is wrong, however, is made in strong terms and the strength of the statement would seem to require that substantial reasons be provided.

Reliance on Scott's article also brings with it the deficiencies in that article. What we are concerned about in Scott's article is not her analysis of the common-law position regarding parate executie clauses. Rather, it is that in an analysis of a case dealing with the constitutionality of parate executie clauses she does not herself undertake a comprehensive constitutional analysis in accordance with the established tools and techniques developed by the Constitutional Court before stating that the *Findevco* judgment is 'patently wrong' (Scott op cit 656) and should not be followed. Of course, *Findevco* itself did not offer a thorough constitutional analysis, but a critique of that judgment that finds it 'patently wrong' should address that problem.

## THE *JUGLAL* DECISION

The *Juglal* case (supra) concerned a perfection clause in a general notarial bond rather than a parate executie clause in a pledge. Consequently, the relevance of the case to the present discussion is limited. The court in *Jugal*, however, does not draw a clear distinction between these types of clauses, despite *Bock* having emphasized the need to do so. The failure to make this distinction means that there are a number of instances where it is not obvious whether the dicta of the court are intended to apply only to perfection clauses or to execution clauses in general. This, in turn, requires that some attention be given to this case when considering the constitutionality of parate executie clauses in pledges of movables.

Some of the points to be raised in relation to *Juglal* are the following:

(i) The court explicitly endorses *Bock*, noting that the refusal of the court a quo to follow the reasoning of Froneman J in *Findevco* was 'proved justified by the decision of this Court in *Bock*' (para 9). The court does not, however, fully explain its reliance on *Bock* and it is thus not apparent what principles have been affirmed. Furthermore, the court does not address any of the weaknesses in *Bock* that we have identified here.

(ii) Certain of the shortcomings of *Bock* are, in fact, repeated in *Juglal*. As noted above, the court focuses on the distinction between circumstances where the security is in the hands of the creditor and where it is in the hands of the debtor (paras 9, 25 and 26). While possession may certainly be a relevant factor, as discussed above, it does not draw the dividing line between what is constitutional and what is not.

(iii) As in *Bock*, the court also does not undertake a thorough constitutional analysis. There is a brief reference to the discussion by the court a quo of the constitutional issues and to its finding that 'the common law of contract does not allow *parate* execution in a manner which infringes the right of recourse to the courts entrenched in section 34 of the Constitution' (para 9). Heher JA goes on state (para 10) that Hurt J, in the court a quo, concluded that

> 'while *parate executie* in theory detracted from the entrenched right, in practice the clause was hedged about with conditions which fully preserve the debtor's right to approach a court for relief. He said, with reference to section 39(3) of the Constitution:
>
> > "A court should be chary of developing the common law in a way which impinges upon the fundamental principles of contract such as the freedom to contract on properly consensual terms and the principles of *pacta sunt servanda* which I think it can safely be said, are fundamentally consistent with the Bill of Rights." '

A number of these considerations are certainly relevant in a constitutional analysis; the issues of contractual freedom and pacta sunt servanda would, for example, be relevant in the limitations enquiry. The bulk of the court's discussion focuses on whether the relevant clauses were contrary to public policy and the court's extensive discussion in this regard would also play a part in the constitutional analysis. As in *Bock*, however, a full constitutional analysis, separating out a rights enquiry and a limitations enquiry, is not undertaken.

## CONCLUSION

At some point, a thorough analysis is required for the law relating to the constitutionality of parate executie clauses in pledges of movables to be settled. This is not provided by *Bock* (or *Juglal*) and an analysis of the court's decision reveals a number of areas of uncertainty. Perhaps the gap left by *Bock* will allow a further opportunity for a litigant to bring the matter before the Constitutional Court for a thorough analysis.

As stated at the outset, we do not here volunteer a comprehensive constitutional analysis. Such an analysis of this issue should, however, address at least the following:

(i) The scope of the right of access to courts. How far does s 34 extend? What conduct or provisions does it prohibit and why?

(ii) Do parate executie clauses in pledges of movables constitute such prohibited provisions? Are possession of the property by the creditor or consent by the debtor relevant here?

(We would submit that considerations of expediency and commercial necessity are not appropriately dealt with at this stage. If parate executie

clauses in pledges are found to violate s 34, these concerns should be addressed at the next stage.)

(iii) Is the violation of s 34 by the common-law rule relating to parate executie in pledges of movables reasonable and justifiable in an open and democratic society in accordance with the limitation clause, s 36 of the Constitution?

Until this analysis is undertaken and these sorts of questions answered, and the matter dealt with by the Constitutional Court, the law in this area cannot be regarded as settled.